

*The Hon’ble Sri Justice V.V.S.RAO

+Writ Petition No.189 of 1999

%22.9.2004

£ Dr.J.Ramachandra Rao

...Petitioner

Vs.

\$ Andhra Pradesh State Civil Supplies Corporation,
and five others.

... Respondents

!For the petitioner ...Mr.Movva Chandrasekhar Rao

^For the Respondent No.1 ...Mr.M.Anil Kumar

For the Respondent No.2 ...Mr. Y. Vivekananda

For the Respondent No.3 ...

For the Respondent No.4 ...

For the Respondent No.5 ...Mr. B.V.Rama Rao

For the Respondent No.6 ...

<Gist:

>Head Notes:

? Cases Referred

1. (2001) 8 SCC 151
2. (2002) 10 SCC 487
3. (2004) 3 SCC 553
4. 1959 (1) AnWR 239 (DB)
5. AIR 1965 AP 177 (FB)
6. AIR 1967 All 423
7. AIR 1985 SC 1096
8. AIR 1965 SC 1740
9. (2001) 2 SCC 549
10. (2001) 2 SCC 549
11. (1998) 8 SCC 1
12. (1994) 4 SCC 104
13. AIR 1989 SC 1642 = (1989) 3 SCC 293
14. (2003) 10 SCC 261

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE TWENTY SECOND DAY OF SEPTEMBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE V.V.S.RAO

WRIT PETITION NO : 189 of 1999

Between:

- 1 Dr.J.Ramachandra Rao son of Satyanarayana
Sri Balaji Nursing Home, Tanuku, West Godavari Dist
- 2 Dr.J. Lakshmi W/o J. Ramachandra Rao
Medical Practitioner, Tanuku, D.M.C. West Godavari Dist
- 3 J.Bhaskara Rao, S/o. J. Satyanarayana
H.No.6-3-456/22, Dwarakapuri Colony hyderabad

..... PETITIONERS

AND

- 1 Andhra Pradesh State Civil Supplies Corporation, rep. by the
Chairman and Managing Director,
Civil Supplies Bhavan, Somajiguda, Hyderabad.
 - 2 A.P.State Financial Corporation, rep. by the Managing Director
Chirag-ali-lane, Hyderabad
 - 3 State Bank of India, rep. by its Branch Manager,
Tadepalligudem , West Godavari District
 - 4 M/S Delta Oil and Fats Limited
Prattipadu, Tadepalligudem Tq., W.G. Dist
 - 5 B.V. Rama Rao
wine Merchant, Tadepalligudem, West Godavari Dist
 - 6 M/s. Sri Durga Egg Pack Industries, Godala Village,
Korukonda Mandal, East Godavari District.
- (Sixth respondent is impleaded as per Court Order
dt.20.7.2000 in W.P.M.P.No.15911 of 1999.)

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue an appropriate writ of Mandamus directing respondents 1, 2, and 5 to pay the sum of Rs. 1,29,19,683-00 i.e., Principle sum of Rs. 52.00 lakhs with 19.5% interest with quarterly rests from 28.2.1993 upto 31.12.1998 and subsequent interest at the same rate till the date of payment to the 3rd respondent Bank towards the loan payable by 4th respondent to 3rd respondent Bank in O.A.N.58/97 on the file of the Debt Recovery Tribunal, Bangalore which sum is payable as a direct result for violating the directions of this Hon'ble court in WP.No.7385/93 and review WPMP.No.4605/94 arbitrarily.

Counsel for the Petitioner:MR.MOVVA.CHANDRASHEKAR RAO

Counsel for the Respondent No.1:MR. ANIL KUMAR

Counsel for the Respondent No.2:MR. Y. VIVEKANANDA

Counsel for the Respondent Nos.3:

Counsel for the Respondent No.4:

Counsel for the Respondent No.5:MR. B.V.RAMA RAO

Counsel for the Respondent No.6

The Court made the following :

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.189 OF 1999

ORDER:

In this Writ Petition the three petitioners are praying this Court to issue a Writ in the nature of Writ of Mandamus directing respondents 1, 2 and 5 to pay a sum of Rs.1,29,19,683.00 (Rupees one crore twenty nine lakhs nineteen thousand six hundred and eighty three only), i.e., principal sum of Rs.52,00,000 (Rupees fifty two lakhs) with interest at 19.5% with quarterly rests from 28.2.1993 to 31.12.1998 and subsequent interest at the same rate till the date of payment to the third respondent bank towards the loan payable by the fourth respondent company to third respondent bank in Original Application No.58 of 1997 before the Debts Recovery

Tribunal (DRT), Bangalore.

The second petitioner is wife and third petitioner is brother of first petitioner. First petitioner is Managing Director and petitioners 2 and 3 are Directors of fourth respondent – M/s.Delta Oil and Fats Limited (hereafter called, the Company), which was promoted as joint venture with A.P.Civil Supplies Corporation, first respondent herein. First respondent holds 50% of the shares and petitioners jointly hold 35% of the shares and the remaining 15% are held by third parties. Fourth respondent availed a term loan of Rs.28.5 lakhs from A.P.State Financial Corporation (APSFC), second respondent herein, and a sum of Rs.48.5 lakhs from State bank of India, Tadepalligudem Branch, third respondent herein towards working capital and the bridge loan of Rs.10 lakhs from the first respondent. APSFC has first charge and SBI has second charge over the unit of fourth respondent which was established at Prattipadu, West Godavari District. Fourth respondent unit started production in 1983 and was allegedly making profits upto 1989. It paid back the bridge loan amount of Rs.10,00,000/- (Rupees ten lakhs only) with interest to first respondent and also declared dividends during that period. However, due to adverse market forces the company started incurring losses from 1990 onwards. In extraordinary General Body meeting of the Company held on 12.8.1991 it was resolved to remove first petitioner as Managing Director and petitioners 2 and 3 as Directors. They intimated alleged withdrawal of personal guarantee bonds executed by them at the time of borrowing loans from respondents 2 and 3. First respondent Corporation represented by its District Manager was made Managing Director of the Company. It was also resolved to lease out the unit and when bids were invited, a prospective bidder offered a lease amount of Rs.19,00,000 (Rupees nineteen lakhs only) per year for a period of three years. If it was finalised, the company would have got Rs.57,00,000/- (Rupees fifty seven lakhs only) by way of lease amount. But, first respondent did not finalise the lease nor took any steps for reviving the unit. The unit was kept idle since 12.8.1991.

At that stage, first petitioner offered to buy 12,000 shares held by first respondent at Rs.102/- per share whereas the book value was only Rs.40/-. An amount of Rs.3.6 lakhs was paid, but first respondent did not consider the matter nor refunded the amount of Rs.3.6 lakhs. Therefore, first petitioner filed a suit being O.S.No.105 of 1992 on the file of the Court of Senior Civil Judge, Tadepalligudem which was later transferred to DRT and marked as O.A.No.58 of 1997 for recovery of the said amount. As the loan taken from respondents 2 and 3 was not discharged in time, there was continuing accumulation of interest on the principal.

APSFC in exercise of their powers seized the unit of the Company in January 1993 and issued notification inviting bids for selling the unit by auction. The auction was held on 28.2.1993. One Sri G.K.B.Choudary offered maximum offer of Rs.54,00,000/- (Rupees fifty four lakhs only), which according to the petitioners is fair and reasonable and second respondent was also satisfied with the offer received.

APSFC did not finalise sale due to interference by the Government of Andhra Pradesh in GAD Department, who advised the second respondent to finalise the

sale only after consultation with the first respondent. Aggrieved by the same, first petitioner filed a writ petition being W.P.No.7385 of 1993 for a direction to APSFC to confirm the sale in favour of highest bidder and discharge the loan payable by the company. This Court disposed of the said Writ Petition on 8.10.1993 directing the APSFC to take a decision with regard to sale within a period of one month or go in for fresh auction within a period of two months. As the APSFC did not take any action as directed by this Court, first petitioner filed a review petition being Rev.W.P.M.P.No.4605 of 1994 praying this Court to direct first respondent to release the personal guarantee furnished by petitioners. This Court disposed of the said application by order dt.20.1.1995 holding that second respondent grossly disobeyed the directions of this Court in Writ Petition No.7385 of 1993. In spite of the directions, second respondent did not take action for confirmation of sale for Rs.54,00,000/- but in collusion with first respondent lifted the seizure after receiving a sum of Rs.2.5 lakhs in partial discharge of the sum duly cancelling the auction held on 28.2.2003. It is alleged that due to disobedience on the part of second respondent in complying with the orders of this Court and also due to gross negligence and collusion with first respondent, second respondent lost the right of enforcing personal guarantee bonds executed by the petitioners.

First respondent did not operate the unit and it was kept idle. APSFC seized the unit and re-advertised the sale on 13.11.1998. This time fifth respondent offered to buy the unit for Rs.50,00,000/- (Rupees fifty lakhs only) payable in instalments without interest. Due to negligence on the part of APSFC in selling the unit, the petitioners suffered heavy loss for no fault of their own. Second respondent and first respondent colluded with each other in defeating the rights of petitioners and if only they had acted diligently fourth respondent company would have discharged all its loans, because by the time they conducted second auction, the arrears mounted up. Second respondent failed to discharge its legal duty cast on them under Section 29 of the State Financial Corporations Act, 1951 (for short, the SFC Act) and hence it is guilty of misconduct in not taking timely decision for confirmation of sale. Thereafter, after adjusting Rs.2,00,000/- (Rupees two lakhs only) paid by first respondent to second respondent, second respondent is liable to pay balance of Rs.52,00,000/- (Rupees fifty two lakhs only) with interest at 19.5 % (rate of interest chargeable by the APSFC) from 28.2.1993 to 31.12.1998 which comes to Rs.1,29,19,683/- (Rupees one crore twenty nine lakhs nineteen thousand six hundred and eighty three only) in discharge of the loan payable to third respondent who has filed suit for recovering principal amount of Rs.67.8 lakhs with interest at 19.5% with quarterly rests.

First respondent filed a counter affidavit admitting the share holding pattern in the fourth respondent company by petitioners and first respondent. It is stated that the company was laid off on 31.5.1991 due to non-availability of working capital. As per the decision of the shareholders of the company, auction to lease out the factory was notified

when the highest bid of Rs.19,00,000/- for a period of three years was received. First

respondent referred the matter to APITCO, who opined that the lease amount is very less. Therefore, the idea of leasing out was dropped by the shareholders of fourth respondent company. The petitioners had alternative remedy of approaching the High Court under the provisions of the Companies Act, 1956 (for short, the Companies Act) and also to approach the company requesting to hold the meeting of the shareholders of the fourth respondent company. In the meeting held on 12.8.1981 first petitioner was removed as Managing Director and, petitioners 2 and 3 resided as Directors, and thereafter petitioners never attended General Body Meeting of the Company.

It is further stated that first petitioner filed W.P.No.12149 of 1996 praying for a direction to respondents 1 and 2 to discharge the petitioners liability as personal guarantors in relation to debts due from fourth respondent company by replacing with the corporate guarantee of first respondent. The High Court dismissed the Writ Petition holding that the relief prayed by first petitioner cannot be granted in the Writ Petition observing that the liability of petitioners regarding personal guarantee executed by them in relation to the debts due from the company is a matter which cannot be considered in the Writ Petition. The matter was carried in appeal to Division Bench, which dismissed the Writ Appeal on 31.8.1998. Therefore, the Writ Petition is not maintainable in law. First respondent which holds 50% share capital in the company, referred the matter to the Government to disinvest 12,000 shares in the joint venture company. The Government accorded permission to first respondent to disinvest 12,000 shares of Rs.100/- each at the best market price or par value whichever is higher in the interest of first respondent. Accordingly, an offer was made to first petitioner valid upto 11.10.1992. However, having regard to financial performance of the company for the years 1988-89, 1990-91, and 1991-92, the Government of Andhra Pradesh by its orders made in G.O.Ms.No.46, dt.6.4.1993 revoked the approval given for disinvestment. The Government also directed to explore the possibility of running unit through MARKFED/STC and initiate steps to investigate affairs in the business during the tenure of the former Managing Director. The Government also instructed the second respondent not to finalize the sale of the unit without the concurrence of first respondent. First respondent wrote letters to MARKFED/STC/Agros Industries, but did not receive any communication expressing willingness to run the unit. One Sri Ch.Satya Rao, who submitted a proposal to take over the unit also withdrew the proposal. In the meanwhile, second respondent approached the unit for sale and the petitioner filed Writ Petition No.7385 of 1993 which was disposed of directing the second respondent to take a decision regarding confirmation of the auction within a period of two months. Subsequently, the petitioner filed a review petition which was closed on 12.11.1996. Again the first petitioner approached this Court by filing Writ Petition No.12149 of 1996 which was dismissed. The first petitioner offered to purchase 50% of shares held by first respondent at the rate of Rs.102/- per share. The matter was referred to the Government for consideration. The first petitioner filed a case before the State Consumer Disputes Redressal Commission which was dismissed as withdrawn. The first petitioner again filed Writ Petition No.22872 of 1994 for direction to refund the amount paid by the first petitioner. This Court dismissed the Writ Petition.

In the counter affidavit referring to various transactions of the fourth respondent company, it is alleged that first petitioner has not approached the Court with clean hands and that he is involved in huge financial irregularities and fraud. As the dispute is in relation to purely commercial transaction between petitioners and respondents, Writ Petition would not lie. It is also stated that the company requested the first respondent to give a loan of Rs.2,50,000/- (Rupees two lakhs fifty thousand only) in order to discharge of the loan due to second respondent. Such loan sanctioned by first respondent was paid by fourth respondent company to second respondent and hence unit of the fourth respondent was not disposed of. Even according to third respondent, first petitioner has conspired with a view to cause wrongful loss to third respondent, and to get wrongful gain by diverting stocks, sale proceeds without remitting to the third respondent bank. First respondent being a shareholder as per Section 34 of the Companies Act, is liable only to the extent of share capital. First respondent has already paid the entire share capital and therefore there is no need to discharge the loan incurred by fourth respondent company to SBI, and first petitioner alone is responsible for the entire mismanagement.

The APSFC initially filed a counter along with W.V.M.P.No.789 of 1999. Again when petitioners filed W.P.M.P.No.15912 of 1999 seeking further interim orders, APSFC filed another counter affidavit. The averments made in these two counter affidavits may be noticed in brief. The allegation regarding sale of the unit for an amount of Rs.54,00,000/- (Rupees fifty four lakhs only) as per the order of this Court in Writ Petition No.7385 of 1993 is not denied. It is stated that as directed by this Court on 8.10.1993, the Managing Director of first respondent had discussions with Managing Director of APSFC, and first respondent gave willingness to pay a sum of Rs.4,99,000/- (Rupees four lakhs ninety nine thousand only) to enable the second respondent to lift the seizure, that the first respondent vide letter dt.17.12.1993 remitted a cheque for Rs.2,50,000/- (Rupees two lakhs fifty thousand only) as against total outstanding amount of Rs.6,62,000/- (Rupees six lakhs and sixty two thousand only) due from the company and that having regard to the decision taken by the Managing Director of the second respondent, the seizure was lifted accepting the payment of Rs.2,50,000/- (Rupees two lakhs fifty thousand only) and unit was handed over to the District Manager on 18.4.1994.

Second respondent further states that it went on addressing several letters to first respondent for settlement of loan account, in vain. Therefore, on 1.10.1996 recall-cum-sale notice was issued, but having regard to the request made by Chairman and Managing Director of first respondent, and also having regard to the fact that first respondent filed a petition before the Company Law Board against petitioners, further action was dropped. However, second respondent again failed to remit the dues to APSFC and addressed a letter dt.29.8.1998 stating that fourth respondent has become sick due to misdeeds of first petitioner. The allegation that second respondent acted negligently in not accepting the offer made by Sri G.K.B.Choudary at Rs.54,00,000/- (Rupees fifty four lakhs only) early nineties (90s) is denied. The allegation made by petitioners regarding actual outstanding amount at the time of conducting first sale are also denied. It is further alleged that fourth respondent

company suffered and sustained losses only on account of acts of omission and commission on the part of the petitioners and therefore they alone personally liable to discharge the debt due to SBI.

During the pendency of the Writ Petition, petitioners filed a miscellaneous petition being W.P.M.P.No.15912 of 1999 seeking orders from this Court directing respondents 2 to 6 to deposit a sum of Rs.36,00,000/- (Rupees thirty six lakhs only) for discharging the debt payable to third respondent Bank. In this W.P.M.P. the APSFC has filed a counter affidavit bringing to the notice of the Court the events that took place after filing Writ Petition. It is stated that fifth respondent withdrew the proposal for purchase of the assets of the fourth respondent and did not deposit any amount. In view of the same, the assets were sold to M/s.Durga Egg Pack Industries – sixth respondent herein, for a total consideration of Rs.38,00,000/- (Rupees thirty eight lakhs only) on outright sale basis taking into consideration the over all situation. The APSFC has right to recover sum of Rs.17,54,796/- (Rupees seventeen lakhs fifty four thousand seven hundred and ninety six only) from out of the amounts realised by sale.

Learned counsel for the petitioners, Sri M.Chandrasekhara Rao submits that in the facts and circumstances of this case, the Writ Petition for payment of money is maintainable. He placed reliance on **M.S.Grewal v. Deepchand Sood, Ramdeo Baba Kamala Nehru Engg. College v. Sanjay Kumar**, and **A.B.L. International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** He further submits that respondents 1 and 2 have violated the Court orders in Writ Petition and Review W.P.M.P. and therefore the action of respondents 1 and 2 is imprudent and negligent. For such dereliction of duties of public authorities, this Court can award damages to the person who monetarily suffers such dereliction of duty.

Learned counsel for first respondent (APCSC), Sri M.Anil Kumar, and learned counsel for second respondent (APSFC), Sri Y.Vivekananda submit that a Writ Petition for award of damages is not maintainable that the petitioners being personal guarantors cannot plead discharge in proceedings under Article 226 of the Constitution of India, that the claim is barred by limitation and that claim is barred by *res judicata*. In support of the last submission, they relied on the orders of this Court in Writ Petition No.12149 of 1996 dt.21.1.1998 which was affirmed by the Division Bench in W.A.SR No.27218 of 1998, dt.31.8.1998. Learned counsel for first respondent further submits that petitioners being shareholders have a number of remedies under the Companies Act like requesting for General Meeting or filing application under Section 393 of the Companies Act, but they cannot be permitted to invoke writ jurisdiction of this Court as the disputed transaction is purely commercial transaction without any public law element. He also submits that the petitioners have not come to this Court with clean hands and that suppressed material facts from this Court. Respondents 1 and 2, he submits – have taken action strictly in accordance with the orders of this Court in Writ Petition No.7385 of 1993 and at one stage settled the matter. In spite of best efforts by first respondent, the Unit could not be revived and therefore ultimately APSFC had to sell the land for best price that was offered. He also submits that though at one stage petitioners offered to purchase shares of first respondent, they never made any attempt to bring a person offering better price

at the time of second sale or third sale.

In his reply arguments, learned counsel for the petitioners Sri M.Chandrasekhara Rao submits that merely because a direction is sought to respondents 1 and 2 to pay a specified amount, a Writ Petition cannot be dismissed when there are facts which are admitted by contesting parties. Secondly he pleads that the claim is not barred by limitation as the second respondent advertised the sale only on 28.11.1996 pursuant to which fifth respondent made offer of Rs.50,00,000/- (Rupees fifty lakhs only) Thirdly he would urge that the plea of res judicata has not been expressly pleaded by respondents 1 and 2 in their pleadings and therefore the principle of waiver applies and respondents 1 and 2 cannot be permitted to raise the plea of res judicata. Further, when there was no proper cause of action in the earlier proceedings, the same does not operate as res judicata. He placed reliance on **A. Raghurama Arya v. Bapanna Rao, Katragadda China Anjaneyulu v. Katragadda China Ramayya, Sukhni v. Sukhbasi, and Jaswant Singh v. Custodian of Evacuee Property.**

The background facts and rival submissions give rise to these points for consideration.

- I. Whether Writ Petition for a direction to respondents 1, 2 and 5 to pay a sum of Rs.1,29,19,683/- (principal and interest) is maintainable ?
- II. Whether the respondents 1 and 2 are liable to pay the sum claimed by petitioners for their alleged negligence and failure to comply with the orders of this Court in Writ Petition No.7385 of 1993, dt.8.10.1993 ?
- III. Whether the claim made by petitioners is barred by principle of res judicata ? and
- IV. Whether the claim made by petitioners is barred by limitation ?

In Re Point No.(I)

A Writ Petition would lie only against State as defined under Article 12 of the Constitution of India. If a person seeks payment of money from a private person, a suit for recovery of money would lie. If a person seeks payment of money towards refund of excess tax or charges for the work done or service given etc., from State or public authority, Writ Petition is not a proper remedy. The exercise of power of judicial review is subject to many limitations. One such being the adjudication of disputed questions of fact. Invariably, a petition or application for judicial review is decided based on affidavits, counter affidavits and supporting documents. If the case involves serious disputed questions of fact, ordinarily, the Court would refrain from adjudicating such issues. Generally, all claims for money involve exercise of adjudication of questions of fact. Therefore, Writ Petition for refund of money or for that matter damages is ordinarily not maintainable. In a petition for damages relevant issues would be whether the respondent is guilty of dereliction of duty or guilty of negligence, whether the defence taken by the respondent like good faith, diligence

etc., is sufficient to discharge respondent etc., are all matters involving production of acceptable evidence. In all situations and circumstances, the affidavit evidence would not be sufficient to arrive at definite conclusion even on balancing of probabilities. Therefore, over a period of time, the Courts, by and large, have taken the view that claim for money by way of writ petition is ordinarily not maintainable.

In **Suganmal v. State of Madhya Pradesh** (perhaps the first authority) a Constitution Bench of the Supreme Court considered the question whether a petition under Article 226 of the Constitution of India for refund of money collected by the State as tax, is maintainable. In the said case, the appellant was proprietor of Bhandari Iron and Steel Company, which had its foundry in Indore carrying on business of Mechanical Engineers, Iron, Brass and Malleable Iron founders and Re-rollers in Steel. Though it was not carrying on any business of cotton mill, it was called upon to pay industrial tax under Industrial Tax Act imposed on cotton mills. During the years 1941 to 1943, the authorities assessed the industrial tax payable by the appellant, and the amount was paid. The appeals filed by the appellant were decided in their favour holding that the appellant is not liable to pay industrial tax. The attempts of the appellant for refund of amount from the State Government proved unsuccessful and therefore a Writ Petition was filed before the High Court of Madhya Pradesh. The High Court dismissed the Writ Petition holding that Writ of Mandamus could not be issued for the purpose of refund of tax wrongly realised by the State. The Supreme Court affirmed the view and held that “normally, petitions solely praying for refund of money against State are not maintainable and that the aggrieved party has right to go to Civil Court where the State can raise all the defenses which cannot be raised in Writ Petition”. It was held as under:

On the first point, we are of opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Art. 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority, which had illegally collected the money as a tax. We have been referred to cases in which orders had been issued directing the State to refund taxes illegally collected, but all such cases had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the Courts were moved by a petition under Art. 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and therefore, could take action under Art. 226 for the protection of their fundamental right, and the Courts, on setting aside the assessment orders, exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle, and therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right.

U.P. Pollution Control Board v. Kanoria Industrial Ltd. is also a case which

involved the claim of respondent industry for refund of amount paid by them as water cess under the provisions of Water (Prevention and Control of Pollution) Cess Act, 1977. The High Court of Allahabad directed the U.P. Pollution Control Board to refund the sums realised from the respondent as water cess. Before the Supreme Court it was contended that a Writ of Mandamus could not be given for refund of the amount. The Supreme Court referred to various decisions on the point, including the decision in **Suganmal v. State of Madhya Pradesh** (supra), as to maintainability of Writ Petition in relation to a claim for refund of money observing that **Suganmal v. State of Madhya Pradesh** (supra) cannot be read as laying down the law that no Writ at all can be entertained. It was laid down:

.....It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. **For instance, in the case on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy of tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case.**

(emphasis supplied)

In a recent judgment reported as **A.B.L. International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** (supra), the Supreme Court again considered the question whether a money claim cannot be granted in Writ Petition under Article 226 of the Constitution of India. The Court referred to **Suganmal v. State of Madhya Pradesh** (supra) and **U.P. Pollution Control Board v. Kanoria Industrial Ltd.** (supra). and while laying down three legal principles observed:

From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

- (a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.
- (b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
- (c) A writ petition involving a consequential relief of monetary claim is also maintainable.

However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power

to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power (See *Whirlpool Corpn. v. Registrar of Trade Marks.*) **And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.**

(emphasis supplied)

In view of the principles laid down by the Supreme Court though in appropriate cases it is always permissible for this Court to entertain claim for refund of money against State or instrumentality of the State, the Court will not normally exercise its prerogative writ jurisdiction to the exclusion of the other available remedies unless such action of the State is arbitrary and unreasonable so as to violate Article 14 of the Constitution of India. If reasonableness of the State action itself is a disputed question requiring elaborate evidence, the Court should refrain from entertaining Writ Petition for money claim.

Though the APSFC has exercised power for seizure and sale of the industrial unit under Section 29 of the SFC Act, the transaction between petitioners, first respondent and second respondent is purely a commercial transaction. In such an event, even if the lis is brought before the Court merely because one of the parties happens to be the State or instrumentality of the State, ordinarily, a Writ Petition would not lie, because there is no public law element involved in the case and such matters are to be resolved in common law Court. In **Asst. Excise Commissioner v. Issac Peter** the Supreme Court dealing with said principle laid down as under:

...In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract — or rather more so. It is one thing to say that a contract — every contract — must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do

not support their proposition. In ***Dwarkanadas Marfatia v. Board of Trustees of the Port of Bombay*** it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine...

The petitioners are admittedly shareholders and Directors of fourth respondent company. They also stood as guarantors for the amounts advanced by second respondent as well as third respondent. Their obligation arises out of contract of guarantee. The APSFC in exercise of their powers brought the unit of the fourth respondent for sale and for various reasons could not confirm the sale on first two occasions and ultimately, when the unit was brought to sale for third time, the bid was finalised in favour of sixth respondent. In the whole exercise, the petitioners allege that the APSFC sold the unit for a price which is far below the market rate. They also allege that if only APSFC had accepted the bid of Rs.54,00,000/- (Rupees fifty four lakhs only), it got at the time of conducting sale in the first time, the entire loan of fourth respondent to third respondent could have been discharged to a major extent. Because there was a delay on the part of second respondent in confirming the sale, interest has mounted up resulting in liability of fourth respondent and petitioners as guarantors has gone up.

Whether respondents 1 and 2 have not taken timely action and whether second respondent failed to take proper decision as a prudent business organisation at appropriate time are matters which cannot be decided in these proceedings. It cannot be denied that relationship of the petitioners with fourth respondent on the one hand, and the relationship of the fourth respondent with the second respondent on the other hand is contractual relationship subject to regulatory regime of the Companies Act, SFC Act, Contracts Act, and the like. Whether each of the parties to the contract have acted as per their obligations and whether any of them failed to discharge their obligations under the contract are matters which cannot be decided in Writ Petition, especially when the petitioners gave personal guarantee for the loan advanced by third respondent. These matters can be well agitated before Civil Court in which event, respondents 1 and 2 can raise all their defences, which cannot be raised nor considered in Writ proceedings. The petitioners in a way are seeking a Writ of Mandamus to rewrite the contract of guarantee with third respondent. In exercise of jurisdiction under Article 226, this Court cannot rewrite contract in relation to a commercial transaction between borrower and financier. A reference may be made to **Orissa State Financial Corpn. v. Narsingh Ch.Nayak**.

In **Orissa State Financial Corpn. v. Narsingh Ch.Nayak** (supra) the respondent purchased a truck after obtaining loan from Orissa State Financial Corporation (OSFC). As the loanee committed default, exercising powers under Sections 29 and 30 of the SFC Act, the vehicle was seized. The same was challenged before the Orissa High Court in Writ Petition. The Court stayed confirmation of the sale subject to borrower depositing an amount of Rs.25,000/- (Rupees twenty five thousand only). The said amount was not deposited and

therefore the vehicle was sold for a sum of Rs.2,20,000/- (Rupees two lakhs and twenty thousand only). The sale was confirmed on 28.1.1991. The borrower again approached the High Court for interim order for releasing vehicle. The High Court issued a notice as to why Corporation should not be punished for having deliberately flouted the orders of the Court. Subsequently, the High Court also passed order directing the Corporation to handover the vehicle to the borrower on depositing Rs.12,000/- (Rupees twelve thousand only). Again an application was moved complaining that office of the Corporation failed to carry out directions of the High Court and that the vehicle was not handed over to him. By that time the vehicle was handed over to auction purchaser. The Court granted one month's time to the Corporation to take possession of the vehicle to auction purchaser if necessary by seeking Police help. Ultimately the Writ Petition and the Contempt Case were disposed of by the High Court directing the Corporation to sanction loan to the petitioner to purchase new truck and also directed to write off remaining amount payable by the borrower duly giving liberty to the borrower to file application for waiver of interest. The order of the Orissa High Court was challenged before the Supreme Court. The Supreme Court allowed the appeal holding thus:

...On a plain reading of the impugned order it is manifest that the High Court while considering the writ petition filed by the owner of the vehicle for quashing of the notice of auction-sale and for other consequential reliefs has passed order drawing up a fresh contract between the parties and has issued certain further directions in the matter; the Corporation has been directed to advance a fresh loan to the writ petitioner to enable him to purchase a new truck; to enter into agreement for realization of the balance loan amount in accordance with law; to write off the remaining amount of Rs.16,500 and to order waiving of the interest till date etc. **The order, to say the least, was beyond the scope of the writ petition which was being considered by the High Court and beyond the jurisdiction of the Court in a contractual matter. No doubt, while exercising its extraordinary jurisdiction under Article 226 of the Constitution the High Court has wide power to pass appropriate order and issue proper direction as necessary in the facts and circumstances of the case and in the interest of justice. But that is not to say that the High Court can ignore the scope of the writ petition and nature of the dispute and enter the field pertaining to contractual obligations between the parties and issue such directions annulling the existing contract and introducing a fresh contract in its place.**

(emphasis supplied)

In view of the finding on Point No.(I), the Writ Petition is not maintainable. This Court is not referring to various pleadings and contentions elaborately nor it is proper to consider other points for consideration. All the questions raised herein are left open and liberty is reserved to petitioners to raise all the grounds before the DRT where O.A.No.58 of 1997 is pending, or by filing a suit against respondents 1 and 2. In this Writ Petition no relief, as prayed, can be granted. It is made clear that any observations made herein above shall not be treated as precluding the parties to this Writ petition from raising all the grounds before the appropriate forum.

The Writ Petition, for the above reasons, is dismissed. No costs.

(V.V.S.RAO, J)

.9.2004

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To

(One fair copy to the Hon'ble Mr. Justice V.V.S. RAO (for his Lordships kind perusal)

1. The Chairman and Managing Director,

Andhra Pradesh State Civil Supplies Corporation,

Civil Supplies Bhavan, Somajiguda, Hyderabad.

2 The Managing Director,

Andhra Pradesh Financial Corporation,

Chirag-ali-lane, Hyderabad

3 The Branch Manager, State Bank of India,

Tadepalligudem, West Godavari District

4 The Under Secretary, Union of India, Ministry of Law, Justice and

Company Affairs, New Delhi.

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